

HOUSE BILL No. 1055

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-5-0.5.

Synopsis: Prices charged to retailers by suppliers. Provides that a supplier commits an unconscionable act that is treated the same as a deceptive act under the deceptive consumer sales law if the supplier refuses to sell to a retailer with which the supplier has done business within the previous two years a good that is a food or beverage product at the same price that the supplier sells the good to any other retailer. Establishes exceptions. Provides that certain deceptive consumer sales provisions do not apply to the unconscionable act. Requires a court to award to a retailer the difference between the higher price at which the goods were sold to the retailer and the lower price at which the goods were sold to another retailer if a court finds a supplier has committed an unconscionable act. Requires a court to award to the attorney general on behalf of the state, if the attorney general files an action to enjoin the unconscionable act, a civil penalty equal to two times the amount of the difference between the higher price at which the goods were sold to a retailer and the lower price at which the goods were sold to another retailer.

Effective: July 1, 2015.

Soliday

January 6, 2015, read first time and referred to Committee on Judiciary.



First Regular Session of the 119th General Assembly (2015)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2014 Regular Session and 2014 Second Regular Technical Session of the General Assembly.

HOUSE BILL No. 1055

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-5-0.5-4, AS AMENDED BY P.L.65-2014,
2 SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2015]: Sec. 4. (a) A person relying upon an uncured or
4 incurable deceptive act may bring an action for the damages actually
5 suffered as a consumer as a result of the deceptive act or five hundred
6 dollars (\$500), whichever is greater. The court may increase damages
7 for a willful deceptive act in an amount that does not exceed the greater
8 of:
9 (1) three (3) times the actual damages of the consumer suffering
10 the loss; or
11 (2) one thousand dollars (\$1,000).
12 Except as provided in subsection (j), the court may award reasonable
13 attorney fees to the party that prevails in an action under this
14 subsection. This subsection does not apply to a consumer transaction
15 in real property, including a claim or action involving a construction



defect (as defined in IC 32-27-3-1(5)) brought against a construction professional (as defined in IC 32-27-3-1(4)), except for purchases of time shares and camping club memberships. This subsection does not apply with respect to a deceptive act described in section 3(b)(20) of this chapter. This subsection also does not apply to a violation of IC 24-4.7, IC 24-5-12, IC 24-5-14, or IC 24-5-14.5. Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(b) Any person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions, except as herein expressly provided. Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in a class action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered. Except in the case of an extension of time granted by the attorney general under IC 24-10-2-2(b) in an action subject to IC 24-10, any money or other property recovered in a class action under this subsection which cannot, with due diligence, be restored to consumers within one (1) year after the judgment becomes final shall be returned to the party depositing the same. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. This subsection does not apply with respect to a deceptive act described in section 3(b)(20) of this chapter. Actual damages awarded to a class have priority over any civil penalty imposed under this chapter.

(c) The attorney general may bring an action to enjoin a deceptive act, including a deceptive act described in section 3(b)(20) of this chapter, notwithstanding subsections (a) and (b). However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may:

- (1) issue an injunction;
- (2) order the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers;
- (3) for a knowing violation against a senior consumer, increase the amount of restitution ordered under subdivision (2) in any



amount up to three (3) times the amount of damages incurred or value of property or assets lost;

(4) order the supplier to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action;

(5) provide for the appointment of a receiver; and

(6) order the department of state revenue to suspend the supplier's registered retail merchant certificate, subject to the requirements and prohibitions contained in IC 6-2.5-8-7(i), if the court finds that a violation of this chapter involved the sale or solicited sale of a synthetic drug (as defined in IC 35-31.5-2-321) or a synthetic drug lookalike substance (as defined in IC 35-31.5-2-321.5).

(d) In an action under subsection (a), (b), or (c), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers.

(e) In any action under subsection (a) or (b), upon the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, the trial court, the supreme court, or the court of appeals may require the plaintiff, defendant, claimant, or any other party or parties to give security, or additional security, in such sum as the court shall direct to pay all costs, expenses, and disbursements that shall be awarded against that party or which that party may be directed to pay by any interlocutory order by the final judgment or on appeal.

(f) Any person who violates the terms of an injunction issued under subsection (c) shall forfeit and pay to the state a civil penalty of not more than fifteen thousand dollars (\$15,000) per violation. For the purposes of this section, the court issuing an injunction shall retain jurisdiction, the cause shall be continued, and the attorney general acting in the name of the state may petition for recovery of civil penalties. Whenever the court determines that an injunction issued under subsection (c) has been violated, the court shall award reasonable costs to the state.

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, other than section 3(b)(19) or 3(b)(20) of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five thousand dollars (\$5,000) per violation.

(h) If a court finds that a person has violated section 3(b)(19) of this chapter, the attorney general, in an action under subsection (c), may recover from the person on behalf of the state a civil penalty as follows:

(1) For a knowing or intentional violation, one thousand five



hundred dollars (\$1,500).

(2) For a violation other than a knowing or intentional violation, five hundred dollars (\$500).

A civil penalty recovered under this subsection shall be deposited in the consumer protection division telephone solicitation fund established by IC 24-4.7-3-6 to be used for the administration and enforcement of section 3(b)(19) of this chapter.

(i) A senior consumer relying upon an uncured or incurable deceptive act, including an act related to hypnotism, may bring an action to recover treble damages, if appropriate.

(j) An offer to cure is:

(1) not admissible as evidence in a proceeding initiated under this section unless the offer to cure is delivered by a supplier to the consumer or a representative of the consumer before the supplier files the supplier's initial response to a complaint; and

(2) only admissible as evidence in a proceeding initiated under this section to prove that a supplier is not liable for attorney's fees under subsection (k).

If the offer to cure is timely delivered by the supplier, the supplier may submit the offer to cure as evidence to prove in the proceeding in accordance with the Indiana Rules of Trial Procedure that the supplier made an offer to cure.

(k) A supplier may not be held liable for the attorney's fees and court costs of the consumer that are incurred following the timely delivery of an offer to cure as described in subsection (j) unless the actual damages awarded, not including attorney's fees and costs, exceed the value of the offer to cure.

(l) If a court finds that a person has knowingly violated section 3(b)(20) of this chapter, the attorney general, in an action under subsection (c), may recover from the person on behalf of the state a civil penalty not exceeding one thousand dollars (\$1,000) per consumer. In determining the amount of the civil penalty in any action by the attorney general under this subsection, the court shall consider, among other relevant factors, the frequency and persistence of noncompliance by the debt collector, the nature of the noncompliance, and the extent to which the noncompliance was intentional. A person may not be held liable in any action by the attorney general for a violation of section 3(b)(20) of this chapter if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid the error. A person may not be held liable in any action for a violation of this chapter for contacting a



person other than the debtor, if the contact is made in compliance with the Fair Debt Collection Practices Act.

(m) This section does not apply to a violation of section 11 of this chapter.

SECTION 2. IC 24-5-0.5-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 5. (a) No action may be brought under this chapter, except under section 4(c) of this chapter, unless (1) the deceptive act is incurable or (2) the consumer bringing the action shall have given notice in writing to the supplier within the sooner of (i) six (6) months after the initial discovery of the deceptive act, (ii) one (1) year following such consumer transaction, or (iii) any time limitation, not less than thirty (30) days, of any period of warranty applicable to the transaction, which notice shall state fully the nature of the alleged deceptive act and the actual damage suffered therefrom, and unless such deceptive act shall have become an uncured deceptive act.

(b) No action may be brought under this chapter except as expressly authorized in section 4(a), 4(b), or 4(c) of this chapter. Any action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act.

(c) This section does not apply to a violation of section 11 of this chapter.

SECTION 3. IC 24-5-0.5-11 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 11. (a) **This section does not apply to the following:**

(1) Contracts between a franchisor and a franchisee.

(2) Transactions concerning the sale of alcoholic beverages (as defined in IC 7.1-1-3-5).

(b) As used in this section, "good" means any food or beverage product that is enclosed in a container or wrapped in any manner in advance of the sale of the product at wholesale or retail. The term includes chewing gum.

(c) As used in this section, "retailer" means a person, and any entity affiliated and under common control with the person, that engages in the business of selling tangible personal property to consumers. For purposes of this section, "retailer" does not include a supplier.

(d) For purposes of this section, "supplier" does not include a retailer.

(e) Except as provided in subsection (f), a supplier commits an unconscionable act that is treated the same as a deceptive act under this chapter if the supplier refuses to sell to a retailer with which



1 the supplier has done business within the previous two (2) years a
 2 good at the same price that the supplier sells the good to any other
 3 retailer.

4 (f) A supplier that charges a retailer a higher price for a good
 5 than the supplier charges another retailer does not commit an
 6 unconscionable act under subsection (e) if one (1) or more of the
 7 following apply:

8 (1) The supplier charges a retailer a higher price for goods
 9 based on the retailer purchasing a lower quantity of the goods
 10 than another retailer purchases for a single delivery. For
 11 purposes of this subdivision, the number of deliveries is equal
 12 to the number of vehicles used to transport goods to a retailer.

13 (2) The supplier charges a retailer a higher price for the goods
 14 based only on a greater cost to the supplier to deliver the
 15 goods to the retailer.

16 (3) The supplier charges a higher price for the goods in
 17 response to changing conditions affecting the market for or
 18 marketability of the goods including:

19 (A) imminent deterioration of perishable goods;

20 (B) obsolescence of seasonal goods; or

21 (C) distress sales in anticipation of discontinuance of
 22 business in the goods.

23 A perishable good is not considered in imminent deterioration
 24 under subdivision (3)(A) if the good will still be merchantable after
 25 twenty (20) days.

26 (g) A retailer harmed by a violation of this section may bring an
 27 action for damages. If a court finds a supplier has committed an
 28 unconscionable act under this section, the court shall require the
 29 supplier to reimburse a retailer that is a party to the action the
 30 amount of the difference between the higher price at which the
 31 goods were sold to the retailer and the lower price at which the
 32 goods were sold to another retailer.

33 (h) If:

34 (1) the attorney general brings an action to enjoin an
 35 unconscionable act under this section; and

36 (2) the court finds a supplier has committed an
 37 unconscionable act under this section;

38 the attorney general may recover from the supplier on behalf of
 39 the state a civil penalty equal to two (2) times the amount of the
 40 difference between the higher price at which the goods were sold
 41 to a retailer and the lower price at which the goods were sold to
 42 another retailer.

